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CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONS OF TORTURE AND DETENTION

Report of the working group on the draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on its seventh session

Chairman-Rapporteur: Mr. Carlos Vargas Pizarro (Costa Rica)

Chairman of the drafting group: Ms. Ann Marie Pennegard (Sweden)

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Introduction

1. The Commission on Human Rights, in its resolution 1998/34, took note with appreciation of the report of the working group on the draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (E/CN.4/1998/42 and Corr.1) and requested the working group, in order to continue its work, to meet prior to the fifty-fifth session of the Commission for a period of two weeks, in the course of which the Chairman of the working group, in consultation with the members of the group, may request one additional week with a view to completing expeditiously a final and substantive text, and to report to the Commission at its fifty-fifth session.

2. The Economic and Social Council, in its resolution 1998/35, authorized an open-ended working group of the Commission to meet for a period of two weeks prior to its fifty-fifth session, with a possibility of extending it to three weeks.

I. ORGANIZATION OF THE SESSION

A. Opening of the session and election of officers

3. The working group held its seventh session from 28 September to 9 October 1998. It was opened by the United Nations High Commissioner for Human Rights, Ms. Mary Robinson, who made an introductory statement.

4. At its 1st meeting, on 28 September 1998, the working group elected Mr. Carlos Vargas Pizarro (Costa Rica) as Chairman-Rapporteur. On his proposal Ms. Ann Marie Bolin Pennegard (Sweden) was elected Chairman of the drafting group.

B. Attendance

5. Representatives of the following States members of the Commission on Human Rights attended the meetings of the working group, which were open to all members of the Commission: Argentina, Austria, Brazil, Canada, Chile, China, Cuba, Czech Republic, Denmark, El Salvador, France, Germany, Guatemala, Indonesia, Ireland, Italy, Japan, Malaysia, Mexico, Morocco, Peru, Poland, Republic of Korea, Russian Federation, South Africa, Sudan, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay.

6. The following States non-members of the Commission on Human Rights were represented by observers at the meetings of the working group: Algeria, Australia, Belgium, Bulgaria, Colombia, Costa Rica, Croatia, Dominican Republic, Egypt, Estonia, Ethiopia, Finland, Georgia, Lithuania, New Zealand, Netherlands, Norway, Portugal, Romania, Saudi Arabia, Slovenia, Slovakia, Spain, Sweden, Syrian Arab Republic, the former Yugoslav Republic of Macedonia and Turkey.

7. The Holy See and Switzerland were also represented by observers.

8. The International Committee of the Red Cross and the following non-governmental organizations were represented by observers at the meetings

of the working group: Amnesty International, Association for the Prevention of Torture, Human Rights Advocates, International Commission of Jurists, International Federation of ACAT (Action of Christians for the Abolition of Torture) and International Service for Human Rights.

9. The Committee against Torture was represented by an observer.

C. Documentation

10. The working group had before it the following texts and documents:

E/CN.4/1998/WG.11/1	Provisional agenda
E/CN.4/1998/42 and Corr.1	Report of the working group on its sixth session
E/CN.4/1998/WG.11/WP.1	Working paper submitted by the Secretariat
E/CN.4/1996/28 and Corr.1	Report of the working group on its fourth session
E/CN.4/1997/WG.11/CRP.1	Comments provided by the Government of Finland
E/CN.4/1997/WG.11/CRP.2	Comments provided by the Government of Cuba
E/CN.4/1996/WG.11/WP.1	Working paper submitted by the Secretariat
E/CN.4/1996/WG.11/WP.2	Working paper submitted by the Secretariat
E/CN.4/1991/66	Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations Office at Geneva addressed to the Under-Secretary-General for Human Rights

The text of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and an explanatory note by the Council of Europe.

The text of the Inter-American Convention to Prevent and Punish Torture.

D. Organization of work

11. At its 1st meeting, on 28 September 1998, the working group adopted its agenda, as contained in document E/CN.4/1998/WG.11/1.

12. At the same meeting, on the proposal of the Chairman-Rapporteur, the working group decided, in order to speed up the drafting process, to conduct most of the negotiations in informal meetings, in the form of an open-ended drafting group, as had been the practice in previous years. The drafting

group would then submit its recommendations to the working group in plenary meetings. Such informal meetings of the drafting group, chaired by Ms. A.M. Bolin Pennegard (Sweden), were held from 28 September to 8 October 1998.

13. At the 6th plenary meeting, on 6 October 1998, the working group, upon the proposal made by the Chairman-Rapporteur and supported by the representative of Germany and several other delegations, decided to identify, through informal consultations, the articles and issues that had not yet been agreed upon and the elements that were still outstanding, to clarify the objectives of various articles and the elements to be addressed in each of them, and to reach a common position on which articles or issues were interlinked or formed some sort of "packages" from a substantive point of view. It was the understanding of the working group that such consultations would not imply any commitments on the part of delegations but should serve the purpose of improving and facilitating the drafting process.

14. At the 7th plenary meeting, on 6 October 1998, the observer for Australia, who chaired the informal consultation, reported on their results. He expressed the view that the exercise had been a useful one and that there appeared to be common ground on a number of elements to be contained in the principal outstanding articles. He stated that there was broad agreement that the focus should be on the technical, preventive nature of the protocol.

15. The observer for Australia indicated that with regard to article 1, the following elements were discussed:

(a) The order of the paragraphs: it was felt that the order could be changed so as to focus first on the preventive nature of the protocol and then on how the protocol would operate through visits;

(b) Scope of the article: a number of delegations noted that further work needed to be done on the scope of the article. Language on definitions in the Convention was referred to;

(c) The acceptance of a mission: there was discussion on whether this should be based on a standing invitation to the Subcommittee (i.e. ratification meant acceptance) or whether each mission should be subject to the prior consent of a State party;

(d) There was also discussion on the reference to applicable laws and standards in the article.

16. With regard to article 8, the following elements were addressed:

(a) The close and delicate link to article 1 was generally recognized;

(b) The article should include reference to notification of the mission; consultation on the modalities (including, inter alia, the delegation, persons and places to be visited and dates) and, as a result of the consultation, a mutually arranged technical programme of visits;

(c) It was noted that the article should be read in the context of the principle referred to in article 3.

17. With regard to article 12:

(a) There was general agreement on the element relating to access to persons, places and information;

(b) Another element that needed to be addressed was a reference to national legislation beyond that contained in article 22. Such a reference should not be seen in the context of the relationship between domestic and international law (governed by article 27 of the Vienna Convention on the Law of Treaties). Rather, a number of delegations wanted the relationship between national legislation and the obligations in article 12 to be addressed. The placement of such a reference was also discussed. One aspect of this relationship related to the protection of individual privacy;

(c) A possible reference to the settlement of disputes between the Subcommittee and the State party was raised.

18. On article 13, there was a discussion as to whether there should be a general reference to exceptions to visits or a listing of specific exceptions. Some delegations suggested a merging of the two approaches. It was asked if this second option would not put into question the principles of universality, impartiality and objectivity enshrined in article 3, paragraph 3.

19. Finally, the participants in the informal consultations felt that it could be useful to draw these elements together in some way. To this end, they suggested that the Chairman of the drafting group work informally to draw the elements together in consultation with delegations, in particular in relation to articles 12 and 13 where there seemed to be most common ground.

20. At the 8th plenary meeting, on 7 October 1998, the chief of the Support Services Branch of the Office of the High Commissioner for Human Rights addressed the working group on the question of a possible extension of the session for one additional week, as provided for in Commission resolution 1998/34. The attention of the participants was also drawn to the financial implications of such an extension.

21. At the 9th plenary meeting, on 7 October 1998, the working group agreed with the proposal of the Chairman-Rapporteur not to request an additional week for this year's session of the group.

II. CONSIDERATION AND DRAFTING OF PARAGRAPHS AND ARTICLES OF THE DRAFT OPTIONAL PROTOCOL

22. At the 1st meeting, on 28 September 1998, the Chairman-Rapporteur, in his opening remarks, stressed the urgent need to conclude the work on the draft optional protocol without further delay and stated that it would be especially fitting to do so during the fiftieth anniversary year of the Universal Declaration of Human Rights. He stated that further efforts to eradicate torture should now be concentrated on prevention and recalled that the optional protocol was intended precisely to establish a preventive system

of regular visits to places of detention based on the principles of cooperation, confidentiality, impartiality, objectivity and universality. The main purpose of this new instrument would therefore be to prevent torture, to encourage cooperation and to extend assistance rather than to punish any particular State. The Chairman-Rapporteur called upon all delegations to demonstrate the necessary spirit of cooperation and political will to achieve as much progress as possible.

A. Article 12

23. Upon the proposal by the Chairman-Rapporteur, the working group decided to continue its work on the draft optional protocol by considering article 12 (see E/CN.4/1996/28, annex I, for the text of the outcome of the first reading).

24. At the 1st plenary meeting, on 28 September 1998, the working group, at the invitation of the Chairman-Rapporteur, held a brief exchange of views on various questions relating to article 12.

25. It was generally felt that article 12 was of crucial importance to the whole document since it contained references to the basic commitments that States would accept by ratifying the optional protocol. The purpose of this article was therefore to define what host Governments should offer the Subcommittee in terms of cooperation, information and assistance. The general approach of all delegations was that the contents of the present article 12 could be reduced to several core elements of the visits, including access to the territory, provision of information, access to places of detention and access to individual persons, as well as the opportunity for private interviews with such individuals and the opportunity to communicate with persons who were in a position to supply relevant information.

26. With regard to the issue of domestic law, it was the common understanding that all visits should be effected in the framework of [in accordance with] the national legislation of host countries. This legislation should, however, be consistent with international law, the Charter of the United Nations and other international obligations of the State concerned. It was also emphasized that any reference to national law should only be seen in the context of the conduct of a mission. A view was also expressed that national law and regulations should not be used to hinder the fulfilment of the missions. It was therefore felt that the drafting of a reference to domestic law in another paragraph of article 12 or in a separate article of the protocol, if needed, should be made in a balanced way, and that a proper balance should be established between the rights and duties of the receiving States and those of the Subcommittee members.

27. On the other hand, some delegations felt that it was absolutely necessary to address national legislation in a separate article, and that national legislation could never contradict provisions of the protocol because it had to be consistent with its provisions as part of each State party's international obligations. For those delegations, national legislation was essential to complement and to implement the provisions of the Protocol. They considered that, in the absence of a clear and positive reference to national legislation, many controversies would arise; the Subcommittee might be seen as

a "supranational" body, having "compétence de sa compétence" and enjoying the status of party and judge at the same time, or exercise a unilateral interpretation of States' national legislation.

28. The view was also expressed that a reference to national legislation in an international instrument such as the one that was being drafted should be contemplated on the understanding that respect of the State party's rules and regulations was necessary for the proper fulfilment of the mission and to safeguard its members' integrity, as the non-observance of such regulations might put them at risk, which may compromise the responsibility of the host country.

29. At the 3rd plenary meeting, on 2 October 1998, the Chairman of the drafting group, upon the request of the Chairman-Rapporteur, reported that during the four days of intensive and constructive negotiations, important work had been accomplished on article 12 and the related issue of national legislation, and a number of useful proposals had been submitted. She referred in particular to the text proposed by the delegation of Uruguay which had served as a basis for discussion. However, the drafting group failed to arrive at a final text of article 12. A difficult question still to be solved was that of how article 12 should relate to national legislation and where to place this issue - in article 12 or in a separate article of the optional protocol.

30. At the 11th plenary meeting, on 9 October 1998, the Chairman of the drafting group reported that, owing to time constraints, the group was not able to finalize the examination of article 12 and of the issues relating thereto. She proposed that the text of article 12 (1) and its subparagraphs (a) to (e) as drafted by the group, should be included in annex II to the report of the working group to serve as the basis for future work. This text reads as follows:

"Article 12

"1. Each State Party shall extend full cooperation to the Subcommittee to facilitate the effective fulfilment of its missions within any territory under the jurisdiction of that State Party. In particular, it shall provide:

(a) The delegation with access to, and freedom of movement within, any territory under its jurisdiction for the conduct of the mission;

(b) The Subcommittee or its delegations with all information relevant to the effective conduct of the mission, including in particular on any person or places referred to in article 1;

(c) The delegation with access to and within any place referred to in article 1;

(d) The delegation with access to persons referred to in article 1, and the opportunity for private interviews with them;

(e) The Subcommittee and its delegations with the opportunity to communicate freely with any other person who is in a position to supply relevant information."

31. The Chairman of the informal working group also referred to the understanding reached in the group with regard to this text, as reflected in the three notes (nota benes) reading as follows:

"[N.B.1]. There was an understanding that article 12 has a close relationship with article X dealing with national legislation, inter alia, with regard to issues of safety and privacy.

"It was understood that, based on the outcome of the discussions of article X, article 12, and particularly its chapeau, would therefore have to be revisited and that article 12 may have to be modified based on the terms of article X.

"Some delegations insisted on the need to make a reference in the chapeau of article 12 to article X. They indicated that it was the best way of underlining the close relationship between the two articles.

"[N.B.2] In the context of indent (a), the issue was raised about gaining access to territory which is not under a State Party's jurisdiction but under its actual control. It was noted, however, that the interpretation of the concept of jurisdiction in other instruments included both the notion of formal and actual jurisdiction.

"[N.B.3]. The protection of persons who have communicated with the Subcommittee will be addressed in a separate article."

32. It was proposed by the representative of Germany to reflect article 12 in annex II of the report with a footnote referring to a statement by the Chairman of the drafting group which would contain the wording of the three notes to article 12 (1) informally agreed upon in the drafting group. While this approach was supported by some delegations, there was no agreement on this procedural proposal.

33. At the same meeting, the Chairman of the drafting group also introduced, in her personal capacity, her proposals relating to the issue of national legislation, which reflected various elements which had emerged in her consultations with some delegations. In her view, they could be best placed as paragraphs 2 and 3 of article 12, reading as follows:

"2. In the context of missions, the Subcommittee and its delegations shall pay due regard to relevant rules of domestic and international law in the area of protection of individual rights and freedoms, including on the protection of personal data and property.

"The Subcommittee and its delegations shall also pay due regard to other areas of domestic laws and regulations, provided that such laws and regulations enable, and do not impede, the proper exercise of the tasks accorded to the Subcommittee and its visiting delegations under this protocol.

"3. The State Party and its competent authorities shall aim to resolve with the Subcommittee and its visiting delegations any difficulty arising from the application of this article in the spirit of mutual understanding and cooperation upon which this protocol is founded."

34. Some delegations stated that they did not find the proposal helpful. Other delegations stated that the proposal could form a good basis for further consideration. The Chairman of the drafting group invited delegations to make proposals in the plenary in order to help further consideration at the next session of the working group.

35. The representative of Cuba referred to the proposals made by her delegation during the informal meetings which read as follows:

"The provisions of this Protocol shall apply in accordance with domestic law consistent with the Charter of the United Nations and other international obligations of the State, as well as with the object and purpose of this Protocol."

36. The representative of China proposed the following text as article "X" relating to national legislation:

"Article X

"The provisions of this Protocol shall be applied in accordance with domestic law consistent with the international obligations of the State."

37. The representative of Germany proposed the following text for inclusion as paragraph 2 of article 12 or article "X":

"In conducting a mission, the delegation shall respect domestic law, in particular the principle of individual privacy, consistent with the international obligations of the State Party in accordance with article 27 of the Vienna Convention on the Law of Treaties."

38. The observer for Egypt proposed the following text:

"The provisions of this Protocol shall be applied in accordance with domestic law consistent with the Charter of the United Nations and other international obligations of the State."

39. Following a motion made by the observer for the Netherlands, the debate on article 12 was adjourned.

40. Several delegations submitted their particular views on article 12 and related issues which are given below.

41. The representative of the United Kingdom stated that it was the understanding of his delegation that no decision had yet been taken by the working group on how to deal with the issue of national legislation, whether as part of article 12, as a separate article, or indeed whether the issue should appear in the Protocol at all.

42. The observer for Algeria, referring to article 12 (1), said that the close link between article 12 and article X needed to be emphasized. The "chapeau" of article 12 (1) should therefore appear in annex II together with N.B.1 concerning article X; the two should not be separated. Article 12 (1) could be regarded as a basis for future work only if N.B.1 was taken into account.

43. The representative of Chile stated that, throughout the various sessions of the working group, the Chilean delegation had opposed the inclusion of references to national legislation in the draft protocol because that would, in its view, weaken protection for persons subjected or likely to be subjected to torture. However, given that some delegations found such references to be indispensable, and in a spirit of compromise aimed at reaching a consensus, it could accept a reference to national legislation if it was specified that such legislation must be compatible with international law and consistent with international human rights standards, and that it must not be contrary to the object and purpose of the protocol.

44. On that basis, and on the understanding that the above solution was a compromise to establish that the matter of national legislation would be considered, Chile could support the formula proposed by the Chairman on how article 12 and its nota benes should be considered and included in the report and its annexes. However, that did not prejudge the question of whether to insert such a reference in the context of article 12 or whether to opt for a separate paragraph, an issue that the working group would have to resolve in future discussions.

45. The representative of Uruguay stated that paragraph 1 of article 12, to be used as a basis for future discussions, had been extensively discussed and enjoyed broad support. Nevertheless, it had not been adopted in the first week of work on the understanding that the issue of the links with national legislation should be further analysed. There were several options for the contents and location of any reference to national legislation in the Protocol, ranging from a separate article, the "chapeau" of article 12 (as contained in annex III to E/CN.4/1998/42), a paragraph 2 of article 12 (based on the elements proposed by the Chairman of the drafting group at the present session), or not adding any new reference since article 22 already referred to the obligations of members of the delegation in the conduct of a mission and taking into account that the general principles of international law would apply (i.e. article 27 of the Vienna Convention on the Law of Treaties). Her delegation, like many others that had shown flexibility in considering different proposals, had never agreed to a separate article, as could be implied from a restrictive interpretation of N.B.1, since at that time the working group did not even have a draft proposal to consider. Her delegation was willing to continue at the eighth session any discussion that did not preclude any alternative, it being clear that there were still some substantial differences among the delegations. In the view of her delegation, annex I should include the text of all the articles adopted at second reading; annex II should contain the texts to be used as a basis for further debate. Annex II should therefore include paragraph 1 of article 12 and article 13 (with footnotes) and articles 1 and 8. The text of articles 1 and 8 should not be bracketed, since their substance had not been considered in plenary at the present session. They were just a basis for discussion, and reference

should be made in the relevant parts of the report to the objections that had been raised. The different proposals on national legislation (paragraph 2 of article 12 proposed by the Chairman of the drafting group or a separate article) should be included in the report of the present session.

46. The delegation of France said it considered that a reference to States parties' national legislation in article 12 of the protocol was unnecessary. However, in order to reach a compromise with those delegations wishing such a reference to be included, it had coordinated informal negotiations at the 1997 session which had led to the drafting of a "chapeau". There had been widespread support for that text at the time, although the drafting group had ultimately decided that it was impossible to adopt it without knowing the outcome of the discussion on article 12 (see E/CN.4/1998/42, para. 79).

47. During the negotiations which had taken place at the present session, the French delegation had confirmed its desire to reach a compromise solution. With that in mind it had expressed support for the wording of article 12 proposed by the Chairman of the drafting group on 7 October 1998, which could serve as a worthwhile basis for future work.

48. The question of where to place the reference to national legislation - in article 12 or elsewhere in the text - had not been definitively settled during the discussions at the present session. The French delegation would have no objection to the first paragraph of article 12, as adopted by the drafting group, if necessary together with its nota benes, and the proposal drafted by the Chairman of the drafting group, being placed in an annex. Including both texts in an annex would no doubt have the advantage of presenting a balanced view of the status of work on article 12.

49. The Permanent Missions of Algeria, China, Cuba, Egypt, Saudi Arabia, Sudan and the Syrian Arab Republic submitted their common observations reading as follows:

> "A. The importance of referring to national legislation has to be clearly and positively reflected in the following legal context:
>
> "(i) national legislation is absolutely necessary to complement and implement the provisions of the Protocol;
>
> "(ii) national legislation can never contradict provisions of the Protocol because it has to be consistent with its provisions as part of the international obligations of each State Party;
>
> "(iii) in the absence of a clear reference to national legislation, many controversies will arise. The Subcommittee may be seen as a 'supranational' body, having '<u>compétence de sa compétence</u>', so that it could enjoy a situation of party and judge at the same time, or at least, exercise a unilateral faculty of interpretation of State's national legislation.
>
> "B. To the above-mentioned delegations, the essence of the balance of article 12 was to have a clear-cut obligation upon States on one hand;

on the other hand, national legislation will be addressed in article X. On the basis of this understanding, those delegations accepted article 12 together with its N.B.s as an integral and indivisible package.

"C. The text of N.B.1, prepared by the Swedish delegation and accepted by all delegations, clearly defines the way to address national legislation as being an 'article X', which can only mean 'article X'.

"D. Despite the clarity of the terms of this written understanding as contained in N.B.1, the Chairman of the drafting group then proposed, in the final plenary session, subparagraphs 2 and 3 to article 12 dealing with national legislation. The above-mentioned delegations object to the inclusion of this proposal in the report of the working group for the following reasons:

"(i) It contradicts the understanding reached by all delegations according to which national legislation will be dealt with in article X and not in subparagraphs 2 and 3 of article 12. The Chairman of the drafting group cannot propose something which contradicts an understanding reached under her chairmanship. As a chairman, she is supposed to reflect and respect the views of all countries and the compromise reached under her chairmanship;

"(ii) Many of the other proposals related to national legislation have been discussed much more deeply and gained much wider support but none of them has been reflected in the report by the Chairman of the drafting group.

"E. In the light of the fact that some delegations insisted on separating the two elements of the compromise achieved as a package after difficult negotiations, the above-mentioned delegations are not able to accept paragraph 1 of article 12 to be considered, as agreed, ad referendum.

"F. The outcome of the informal discussions on article 12 was reflected in a 'compromise text' drafted by the Chairman of the drafting group which included a consensual paragraph 1 to article 12, containing clear-cut State obligations and a nota bene (N.B.1) to the effect that those obligations have a close relationship with article X dealing with national legislation.

"For the delegations of Algeria, China, Cuba, Egypt, Saudi Arabia, Sudan and Syria, this compromise was and should remain the basis for a consensus package. Those delegations, therefore, consider the text previously accepted by all delegations (see paras. 30 and 31 above) as the basis for future work regarding article 12.

"G. In addition to the previous points, and without prejudice to their particular views on other main questions, the above-mentioned delegations would like the report of the working group to the Commission on Human Rights to reflect the following:

"(i) Their belief in the objectives of the draft optional protocol and, accordingly, their regret that not only has no progress been achieved, but even a negative atmosphere obviously prevailed;

"(ii) It is even more paradoxal that such a regrettable deadlock has occurred despite the fact that most elements of the crucial articles 12, 13 and article X have been thoroughly debated and a meeting of minds could have been achieved if agreed understandings would have been maintained and respected.

"(iii) Moreover, such a meeting of minds would have served as a basis for a balanced package of compromises concerning the most important elements of the draft optional protocol;

"(iv) In the spirit of the Vienna Declaration and Programme of Action of 1993, the cause of human rights can only be served by respecting all views, searching for balanced compromises, addressing all legitimate concerns, taking due account of existing diversities, transparency, openness and impartiality."

B. Article 12 bis

50. At the 3rd plenary meeting, on 2 October 1998, the Chairman-Rapporteur proposed to keep article 12 bis (see E/CN.4/1996/28, annex I) in the optional protocol and to remove the square brackets at the end of the article. The working group approved this proposal.

51. For the text of the article as adopted, see annex I, article 15.

C. Article 13

52. At the 4th plenary meeting, on 2 October 1998, the Chairman-Rapporteur invited the working group to discuss article 13 (see E/CN.4/1996/28, annex I).

53. The view was expressed that article 13 was one of the provisions that established the necessary balance between the efficacy of the protocol and the needs of States. It was pointed out that exceptional circumstances did exist in reality and should therefore be recognized as such in this instrument. It was stressed, however, that representations could only be made in exceptional circumstances and with a view to a specific visit or a specific interview, not to a mission as a whole. References were often made to article 9 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the wording of which was found by some delegations to be more precise, which could eventually be used by the working group as a basis for discussion.

54. According to another view, article 13 was not needed at all as it was contradictory to the purposes of the protocol and allowed for the possibility of misuse by certain States. It was pointed out that torture was most often

practised in precisely the circumstances that were listed as exceptional in article 13. Some of those circumstances were considered to be neither urgent nor exceptional. The article was thus viewed more as protecting States than preventing torture.

55. Several delegations felt that if article 13 were to be kept in the optional protocol, the list of exceptional circumstances which it contains should be extremely narrow. Paragraph 2 of this article was considered by some speakers to be very important since it offered the possibility of correcting what might be unduly accepted under paragraph 1. It was also indicated that the decision on article 13 would be closely linked to the outcome of negotiations on paragraph 3 of article 18 relating to the issue of whether reservations to the protocol should be acceptable.

56. At the 5th plenary meeting, on 5 October 1998, the observer for Ethiopia proposed to modify the text of this article to read as follows:

"Article 13

"1. In exceptional circumstances, in the context of a mission the competent authorities of the State Party concerned may make representations to the Subcommittee or its delegation against a particular visit. Such representations with respect to that visit may only be made on the grounds that it is temporarily not feasible for reasons of national defence, public safety or serious disorder in the place to be visited. The existence of a declaration of a state of emergency as such shall not be invoked by a State Party as a reason to object to a visit.

"2. Following any such representation, the Subcommittee and the State Party shall immediately enter into consultations regarding those circumstances and seek agreement on arrangements to enable the Subcommittee to exercise its functions expeditiously. Such arrangements may include the transfer to another place of any person whom the Subcommittee proposed to visit. Until the visit takes place, the State Party shall provide information to the Subcommittee about any person or place concerned."

57. Many delegations expressed their support for this proposal which they considered to be a good basis for further discussion.

58. The view was expressed that article 9 of the European Convention should be the basis of discussion and that the term "may make representation" in the Ethiopian proposal was not legally correct because the meaning was "may object". It was also found that the terms "temporarily" and "expeditiously" were repetitious as were the last line of paragraph 2 and the first paragraph of article 12.

59. The observer for the International Committee of the Red Cross found terms such as "national defence", "public safety" and "serious disorder" to be

too vague and considered that invoking them might weaken the procedure of visits and open the door to abuses. She proposed replacing the list of exceptional circumstances in paragraph 1 of article 13 by a reference to "imperative security necessity".

60. The representative of China felt that the list of exceptional circumstances should be comprehensive and even exhaustive and proposed adding to it such considerations as the health status of the person to be visited, urgent interrogation for a serious crime, and serious natural disaster.

61. In the discussion that followed, the view was expressed that such terms as "necessity" or "urgency" were also vague and unclear and that it would be preferable to list possible exceptions in order to avoid the category of exceptional circumstances becoming too broad. According to another opinion, it would be impossible to compile a comprehensive list which could cover all possible reasons for suspending visits; a more general formulation should therefore be used.

62. It was also suggested that in discussing article 13, the important principles of cooperation and confidentiality as reflected in other articles of the protocol should be taken into account. In that regard, it was proposed, with reference to the principle of cooperation, that the use of such wording as "objecting to a visit" should be avoided. It was also suggested that instead of drafting an exhaustive list, some rather general provisions could be considered which would also incorporate the notions of cooperation and trust. In that regard, the observer for Sweden proposed returning to the language of the original Costa Rican draft which provided for "urgent and compelling reasons" as the only possible exceptions.

63. Upon the proposal of the Chairman-Rapporteur, article 13 was referred to the drafting group for further examination.

64. At the 9th plenary meeting, on 7 October 1998, the Chairman of the drafting group reported that very fruitful discussions had taken place and that the group was very close to an agreed text. However, several delegations indicated that they did not want to take any decisions with regard to article 13 before the consideration of article 12 was completed. There was therefore a need for further examination of article 13 in conjunction with article 12.

65. At the 11th plenary meeting, on 9 October 1998, the Chairman of the drafting group reported that no consensus had been reached during the informal meetings on the two different approaches to the issue of exceptional circumstances which could provide a valid reason for a State party to object to a visit. One approach was to base this article on the outcome of the first reading text as further elaborated in the proposal submitted by the delegation of Ethiopia (see para. 56 above). Another approach was to find a more general formula based on the elements contained in the original Costa Rican proposal as amended by Sweden.

66. While no consensus had been reached on any of the approaches, the drafting group had decided to submit to the plenary the revised text of article 13 as proposed by the Chairman. The text read as follows:

"Article 13

"1. In exceptional circumstances, in the context of a mission, the competent authorities of the State Party concerned may make representations to the Subcommittee or its delegation against a particular visit. Objections may only be made on urgent and compelling grounds of national defence, public or individual safety or serious disorder in the place to be visited which temporarily prevent the carrying out of a visit. The existence of a state of emergency as such should not be invoked by a State Party as a reason to object to a visit.

"2. Following any such representation, the Subcommittee and the State Party shall immediately enter into consultations regarding those circumstances and seek agreement on arrangements to enable the Subcommittee to exercise its functions expeditiously. Such arrangements may include the transfer to another place within the jurisdiction of the State Party concerned of any person whom the Subcommittee proposed to visit. Until the visit takes place, the State Party shall provide information to the Subcommittee about any person or place concerned."

67. The Chairman of the drafting group indicated that the agreed text was based on the understanding that it was essential for some delegations to point to a close relationship between article 13 and article 12, in particular relating to the issue of national legislation.

68. In the discussion that followed, several delegations pointed out that they were not in a position to approve the text of article 13. It was proposed by other delegations that the text should be included in annex II to the report of the working group to serve as a basis for future discussion. In that regard, some delegations said that they could only accept this proposal if their view was put on record that the content of article 13 was closely related to article 12, including its nota bene (see paras. 30 and 31 above).

69. On this understanding, and upon the proposal of the Chairman-Rapporteur, the working group decided to include the text of article 13 in annex II to the report.

D. Article 14

70. At the 9th plenary meeting, on 7 October 1998, the Chairman-Rapporteur invited the working group to discuss article 14 as adopted at first reading (see E/CN.4/1996/28, annex I).

71. The observer for the Netherlands suggested the following text for this article, which would replace paragraphs 1 to 3 of article 14:

"Article 14

"1. After each mission, the Subcommittee shall draw up a report which shall be submitted to the State Party concerned. The Subcommittee shall finalize its report after fair consideration is given to comments submitted, within a reasonable time, by the State Party concerned. The comments of the State Party shall be annexed to the report.

"2. The Subcommittee shall submit its final report to the State Party concerned. The report shall contain recommendations that the Subcommittee deems necessary. The Subcommittee may consult on the implementation of the recommendations, including on ways and means in which the State Party can be assisted.

"3. Except as otherwise specified in this Protocol, the information gathered by the Subcommittee and its delegation in relation to a mission, its report and its consultation with the State Party concerned shall remain confidential.

"4. At the request of the State Party concerned, the Subcommittee shall publish the report with its annexes. By agreement between the State Party concerned and the Sub-Committee, the report may be published or made public in part.

"5. If the State Party concerned decided unilaterally to make part of the report or its annexes public, the Subcommittee shall consult the State Party concerned on the way to ensure a balanced presentation of the contents of the report. After this consultation, it may issue a declaration or publish the report and the annexes thereto.

"6. No personal data shall be published without the express consent of the person concerned."

72. The observer for the Netherlands also proposed replacing paragraphs 4 and 5 of article 14 by new articles 14 bis and 14 ter reading as follows:

"Article 14 bis

"1. If a State Party fails to receive a mission, or seriously hampers the conduct of a mission in a way contrary to the letter and spirit of the present Protocol, the Subcommittee may request confidentially an explanation from the State Party, which the State Party concerned shall give without undue delay. In view of the explanations given by the State Party, the Subcommittee shall inform the State Party of its views, after which the State Party and the Subcommittee shall enter into consultation.

"2. If after the consultation, the Subcommittee considers that - despite the explanations given - the State Party does not cooperate with the Subcommittee as required in article 13, paragraph 1, of this

Protocol, the Subcommittee may issue a public declaration. This declaration shall only be published after the State Party has been informed of the intention of the Subcommittee. The State Party shall be allowed to annex its views to such a declaration."

"Article 14 ter

"1. If a State Party does not implement the recommendations of the Subcommittee nor take other appropriate measures with a view to improving the situation of persons deprived of their liberty, the Subcommittee may ask the State Party whether it needs assistance in this matter.

"2. The Subcommittee shall consult with the State Party whether other ways exist to improve the situation of persons deprived of their liberty, including through requesting technical assistance.

"3. If the Subcommittee considers that the State Party is unwilling to improve the situation of persons deprived of their liberty, the Subcommittee may inform the Committee against Torture of the situation, after it has consulted the State Party. It shall append to its information to the Committee against Torture any information the State Party may wish to furnish.

"4. The Committee against Torture shall, in its consideration of periodic reports by the State Party, give due attention to the information received from the Subcommittee."

73. Many delegations thanked the observer for the Netherlands for his efforts and creative approach in his attempts to find an acceptable solution to problems relating to this article. While certain elements of his proposals seemed attractive to some delegations, particularly new articles 14 bis and 14 ter, the prevailing opinion was that both the first reading text of article 14 and the texts proposed by the Netherlands needed further consideration.

74. In the general discussion that followed at this and the following (10th plenary) meeting, it was emphasized that article 14 was one of the key articles of the protocol and no hasty decisions should therefore be taken concerning it. It was also emphasized that article 14 was based on the principle of confidentiality. Particular views were expressed by some delegations with regard to such issues as possible publication of reports of the Subcommittee, issuing a public declaration, and the relationship between the Subcommittee and the Committee against Torture. It was pointed out that public declarations should not be seen as sanctions directed against States but as a means to make the protocol more effective in achieving it purposes. Concerns were voiced as to how the different legal regimes governing the work of the Subcommittee and the Committee against Torture could be reconciled.

75. Some delegations considered it to be important that the element of the feasibility of the Subcommittee's recommendations be given due consideration by the working group. They argued that such recommendations should always be

realistic and formulated by the Subcommittee taking due account of the various economic, social and cultural factors that existed in the country of the visit. According to another view, the Subcommittee should formulate its recommendations as it deemed necessary, and the issue of their feasibility could be considered subsequently, in the course of consultations with the State Party concerned. It was also felt necessary that article 14 should include an express reference to the viability of the recommendations made by the Subcommittee in order for the States not to be compromised by proposals which might result in exorbitant economic or social costs.

76. It was also argued, in connection with the newly proposed article 14 bis, that more balance was needed with regard to possible measures to be taken in case of non-cooperation. The view was expressed that the possibility of the Subcommittee "going public" should be limited to cases when all other possibilities were exhausted, and some time-frame should be established.

77. According to another view, the necessary balance was guaranteed by the provision that the Subcommittee may not issue a public declaration unilaterally but only following consultations with the State Party concerned, which could always annex its views to such a declaration. It was also deemed appropriate for any unilateral declaration by the Subcommittee relating to a mission - carried out or not - to be previously made known to the concerned State Party and that its observations be included in such declaration.

78. Several drafting suggestions were made with regard to the proposals submitted by the observer for the Netherlands. The representative of China proposed to add the word "feasible" before "recommendation" in paragraph 2 of article 14. The observer for Switzerland suggested replacing the word "submit" by the word "send" in paragraph 2 of article 14. The representative of Germany felt that the words "unwilling to improve the situation of persons deprived of their liberty" in paragraph 3 of article 14 ter could be replaced by "unwilling to implement the recommendations regarding the situation of persons ... ." The observer for Egypt was of the view that the question was not "unwillingness to implement recommendations" but rather of a dispute to be settled between a State and the Subcommittee. He added that such a definition of the problem dealt with in article 14 had different legal implications and required substantive modification of the proposed text.

79. The Chairman-Rapporteur suggested that both the first reading text of article 14 and the proposal of the Netherlands should be used as a basis for future drafting.

E. Article 18

80. At its 3rd meeting, on 2 October 1998, the working group, upon the proposal of the Chairman-Rapporteur, considered paragraphs 1 and 2 of article 18 (see E/CN.4/1996/28, annex I).

81. The delegations of Brazil, Chile, Croatia, Denmark, Sweden, Finland, the Netherlands, Germany, Uruguay, Costa Rica and Switzerland, as well as Amnesty International, indicated their preference for the lowest (10) number of ratifications so that the protocol could enter into force as quickly as

possible. However, in view of the emerging consensus, they stated their readiness to support, as a compromise but also as an absolute maximum, the requirement of 20 ratifications. The delegations of Brazil, Cuba, Colombia, Denmark, the Russian Federation and the United Kingdom also indicated their support for 20 ratifications.

82. The representative of Australia expressed the preference of his delegation for a number higher than 20 and suggested that the figure could be decided upon completion of the drafting process, as was the normal practice in similar instances. He felt that a higher number of ratifications was an important cost element and that it would allow having parties to the protocol from all regions of the world. Subsequently, the representative of Australia indicated that his delegation would not stand in the way of emerging consensus and might accept the number of 20 ratifications.

83. The representative of the United States of America agreed with the representative of Australia and also argued for a number higher than 20 ratifications, in part because of the Protocol's financial implications. However, he stated that his delegation could agree with the proposed compromise on the number 20.

84. At the same meeting, the working group adopted paragraphs 1 and 2 of article 18 with the insertion of the number 20.

85. For the text of the paragraphs as adopted, see annex I, article 19, paragraphs 1 and 2.

F. Article 19 bis

86. At the 4th plenary meeting, on 2 October 1998, the working group, upon the proposal of the Chairman-Rapporteur, began the consideration of article 19 bis (see E/CN.4/1996/28, annex I). The Chairman-Rapporteur recalled that paragraph 3 of this article had already been adopted at second reading.

87. The observer for the Netherlands proposed to modify the beginning of paragraph 2 to read:

> "2. An amendment adopted in accordance with paragraph 1 of this article shall come into force when accepted by a two-thirds majority ..."

88. In the discussion that followed, the question was raised whether the amendments to the protocol should be approved by a two-thirds majority or by all States parties.

89. The observer for the Netherlands proposed, in view of the technical nature of the protocol, that delegations seek instructions on whether it would be advisable to delete article 19 bis from the text on the understanding that article 40 of the Vienna Convention on the Law of Treaties would apply to this protocol as to any other multilateral treaty. By thus clarifying their positions, delegations and observers could try to find alternative solutions.

90. The observer for the International Commission of Jurists, referring to possible implications of the above proposal, if adopted, pointed out that the draft optional protocol contained not only purely procedural or technical rules but also more substantive provisions relating, inter alia, to the rights and obligations of States, limitations, findings of the Subcommittee, etc. It could therefore be expected that after a certain period of time States parties might decide that some of those provisions should be modified.

91. In that connection, the representative of Australia also underlined the importance of keeping article 19 bis in the protocol and pointed out that the timing of the entry into force of amendments was not regulated by the Convention on the Law of Treaties.

92. The working group continued the consideration of article 19 bis at its 5th plenary meeting, on 5 October 1998.

93. The observer for the Netherlands proposed to modify the last sentence of paragraph 1 of the article to read:

> "Any amendment adopted by the States Parties present at the conference shall be submitted by the Secretary-General of the United Nations to all States Parties for acceptance."

He also proposed to replace the text of paragraph 2 of article 19 bis by the language used in article 29 (2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The observer for the Netherlands explained that the purpose of his proposal was to remove the dual system of approval which existed in the present paragraph 2 and to avoid situations when States which are not parties to the protocol, vote in the General Assembly against amendments proposed and adopted by the States parties.

94. Some delegations agreed that the procedure providing for double approval of amendments with two levels of majority was somewhat cumbersome and supported the suggested deletion of any references to the General Assembly in order to be in line with the wording of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

95. The observer for Egypt proposed either to delete the last sentence of paragraph 1 or to introduce the two-thirds majority in both paragraphs.

96. The Colombian delegation suggested that the amendment clause could be modified according to the terms of article 24 of the Convention against Torture, including paragraph 3. The delegation did not deem it juridically appropriate to subject the instrument's amendment procedure to the General Assembly's approval, since the matter was exclusively the competence of the States parties.

97. The observer for the Association for the Prevention of Torture proposed using the language of article 29 of the Convention against Torture, but to delete paragraph 3 of article 19 bis altogether.

98. Another view expressed by some delegations was that the existing text of article 19 bis should be kept unchanged.

99. Upon the proposal of the Chairman-Rapporteur, the consideration of article 19 bis was referred to the drafting group.

100. At the 11th plenary meeting, on 9 October 1998, the Chairman of the drafting group reported that the drafting group had considered various aspects of the question and examined several proposals concerning the procedure to adopt in relation to amendments to the protocol. The drafting group discussed in particular the following questions: whether the procedure contained in draft article 19 bis should be retained, considering that otherwise the procedure established under the Vienna Convention on the Law of Treaties would apply; what majority would be needed to adopt an amendment and to make it enter into force; what majority of State Parties present and voting would be needed at a conference of States parties where amendments would be dealt with; and, finally, whether, in addition to the required approval of States parties, an amendment would also need the approval of the General Assembly.

101. The Chairman of the drafting then introduced the text of paragraphs 1 and 2 of article 19 bis as agreed upon in informal meetings. At the same meeting, the working group adopted this proposal.

102. For the text of the paragraphs as adopted, see annex I, article 22, paragraphs 1 and 2.

G. Article 19 tertio

103. At the 3rd plenary meeting, on 2 October 1998, the Chairman-Rapporteur recalled that the proposal by the delegation of Japan to include this article in the optional protocol had been withdrawn (see E/CN.4/1998/42, para 125). The working group decided that the reference to this article should no longer be kept in the text of the draft optional protocol.

H. Other issues

104. At the 11th plenary meeting, on 9 October 1998, a discussion was held on whether articles 1 and 8, as the texts constituting the basis for future work, should again be included in annex II to the report of the working group, as was the case in 1996 and 1997. The Chairman-Rapporteur proposed that a reference to those articles as contained in document E/CN.4/1998/42 could be made in a footnote in annex II. The working group agreed with this proposal.

105. At the same meeting, the observer for the Netherlands stated that his delegation considered that proposals should not be submitted during the last meeting of the working group. Proposals could be submitted either during the earlier meetings, in writing as separate documents, or during the next session. In the view of his delegation, the meeting at which the report was to be adopted should not be used to take up earlier proposals. Furthermore, the observer for the Netherlands regretted that substantive debate was reopened each time during the debate on the adoption of the report.

106. Other comments and observations received by the secretariat were as follows.

107. The Association for the Prevention of Torture expressed its indignation and concern at the atmosphere prevailing in the meeting room, where the participants had gathered to complete a draft instrument for the prevention of torture that was long awaited by the international human rights community. The Association noted an obvious lack of political will to finalize the optional protocol, which had been strongly encouraged internationally, by the end of 1998. The misunderstandings and enormous mistrust among the delegations had killed all spirit of cooperation as well as the expectations of the international community. The Association fervently hope that the proceedings during the coming year would mark a considerable improvement and not be a repetition of what had happened at the seventh session, where attitudes had emerged that were contrary to the commitments to combating torture which had been made, especially in 1998, the year of the fiftieth anniversary of the Universal Declaration of Human Rights.

108. The delegation of Colombia reiterated its interest in an expeditious approval of the draft protocol. It considered such an instrument grounded - as it should be - in the principles of cooperation and confidentiality, to be of vital importance, and it supported provisions ensuring the Subcommittee free access to places of detention and to alleged torture victims in all cases, provided that full respect of national legislation and internal regulations was guaranteed. Finally, it regretted that the progress of work at the present session had not been as expeditious as expected and called for a rapid and satisfactory consensus to be reached.

109. The delegation of the United States of America stated that the obligations of States under the protocol should be precise, and the protocol should not unintentionally infringe on fundamental human rights. Unfortunately, the proposed article 12 would have that effect. It would create an absolute obligation on any State party to provide access to any place or person described in draft article 1, including any private residence and any strictly private hospital or mental institution if an individual was detained there, possibly with State acquiescence. It would be a violation to refuse any request by the Subcommittee to visit such a place. The delegation of the United States of America noted that the Constitution of the United States guaranteed that its citizens would be secure in their homes, and that those acting under colour of law could not have access to private homes without a court determination that there was sufficient probable cause for search, except under very narrow circumstances. That applied not only to United States government officials, but also to the members of the Subcommittee. Under the text proposed, the Subcommittee would have an absolute treaty right to conduct visits virtually anywhere, without restriction, if it were of the view that a person might be detained with mere State "acquiescence". In the case of the United States, such an unchecked and excessive power would be in violation of the Fourth Amendment to the United States Constitution. This was not acceptable. The delegation of the United States was gratified that, as a result of intense informal discussions at the end of the session, many delegations had now stated that privacy laws and requirements for judicial review of warrants, and human rights protections had to be respected; the proposal submitted by the Chair at the end of the session would be a good basis to resolve the issue.

110. The representative of France said that some delegations had felt that article 13 was closely linked to the preceding article, and that it should also be considered in connection with a reference to national legislation. The French delegation, on the contrary, believed that article 13 could be treated independently of article 12, and without the need for any reference to national legislation. Article 12 set forth the obligations which States parties accepted in order to enable the Sub-Committee to conduct its missions in general, whereas article 13 indicated the exceptional circumstances under which a State could object to a visit, and not to a mission. In other words, article 13 could not be viewed as a general exception to article 12, but in fact constituted a particular modality for its implementation.

III. FUTURE WORK

111. At its 11th plenary meeting, on 9 October 1998, the working group discussed the issue of how its work could best be continued.

112. The representative of Germany welcomed the progress that had been made. In the view of his delegation, the apparent difficulties on some of the remaining issues made it necessary to undertake a series of intensive consultations with the purpose of facilitating a comprehensive agreement. He felt that those consultations could best be carried out by the Chairman-Rapporteur. All efforts should be undertaken to finalize the work of the working group in the coming year.

113. Other delegations also felt that the Chairman-Rapporteur should be authorized to conduct informal consultations in the period between the sessions on any remaining issues at stake, and to make proposals to the working group at its next session. In particular, the observer for Egypt proposed to request the Chairman-Rapporteur to conduct inter-sessional open-ended consultations, with a view to drawing upon the lessons of the seventh session, to exploring future methods of work, i.e. on the basis of an integral package approach, taking into consideration on an equal basis all views and concerns.

114. The working group considered that if it were to be authorized to meet for a further session, there would be a reasonable expectation that it could make progress on the preambular part and the remaining articles of the protocol contained in annex I of document E/CN.4/1996/28 (arts. 12, 13, 14, 15, 18, paras. 3, and 19 bis, paras. 1 and 2) and annex II of document E/CN.4/1997/33 (arts. 1 and 8). The final numbering and placement of articles would be decided when the text of the entire draft optional protocol had been agreed. The technical review of the draft optional protocol would then be undertaken.

IV. ADOPTION OF THE REPORT

115. The report of the working group was adopted at the 12th plenary meeting, on 26 March 1999. The details of the adoption will be included, if necessary, in the addendum to the present report.

Annex I

TEXT OF THE ARTICLES WHICH CONSTITUTE THE OUTCOME OF THE SECOND READING AT THE FIFTH, SIXTH AND SEVENTH SESSIONS a/

Article 2 b/

There shall be established a Sub-Committee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture which shall carry out the functions laid down in the present Protocol (hereinafter referred to as the Sub-Committee); the Sub-Committee shall be responsible for organizing missions to the States Parties to the present Protocol for the purposes stated in article 1.

Article 3

1. In the application of this Protocol the Sub-Committee and the State Party concerned shall cooperate with each other.

2. The Sub-Committee shall conduct its work within the framework of the Charter of the United Nations and be guided by the purposes and principles therein.

3. The Sub-Committee shall also be guided by the principles of confidentiality, impartiality, universality and objectivity.

Article 4

1. The Sub-Committee shall consist of 10 members. After the fiftieth accession to the present Protocol, the number of members of the Sub-Committee shall increase to 25.

2. The members of the Sub-Committee shall be chosen from among persons of high moral character, having proven professional experience in the field of the administration of justice, in particular in criminal law, prison or police administration or in the various medical fields relevant to the treatment of persons deprived of their liberty or in the field of human rights.

3. No two members of the Sub-Committee may be nationals of the same State.

4. The members of the Sub-Committee shall serve in their individual capacity, shall be independent and impartial and shall be available to serve the Sub-Committee effectively.

Article 5

1. Each State Party may nominate, in accordance with paragraph 2, up to two candidates possessing the qualifications and meeting the requirements set out in article 4, and in doing so shall provide detailed information on the qualifications of the nominees.

2. (a) Nominees of the Sub-Committee shall have the nationality of a State Party to the present Protocol.

(b) At least one of the two candidates shall have the nationality of the nominating State Party.

(c) Not more than two nationals of a State Party shall be nominated.

(d) Before a State Party nominates a national of another State Party, it shall seek and obtain the written consent of that State Party.

3. At least five months before the date of the meeting of the States Parties during which the elections will be held, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall submit a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them.

Article 6

The members of the Sub-Committee shall be elected in the following manner:

1. Elections of the members of the Sub-Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Sub-Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of the States Parties present and voting.

2. The initial election shall be held no later than six months after the date of entry into force of the present Protocol.

3. The States Parties shall elect the members of the Sub-Committee by secret ballot.

4. In the election of the members of the Sub-Committee, primary consideration shall be given to the fulfilment of the requirements and criteria of article 4. Furthermore, due consideration shall be given to a proper balance among the various fields of competence referred to in article 4, to equitable geographical distribution of membership and to the representation of different forms of civilization and legal systems of the States Parties.

5. Consideration shall also be given to balanced representation of women and men on the basis of the principles of equality and non-discrimination.

6.* If, during the election process, two nationals of a State Party have become eligible to serve as members of the Sub-Committee, the membership of the Sub-Committee shall be resolved in the following manner in conformity with article 4, paragraph 3:

(a) The candidate receiving the higher number of votes shall serve as he member of the Sub-Committee.

(b) Where the nationals have received the same number of votes, the following procedure applies:

(i) Where only one has been nominated by the State Party of which he or she is a national, that national shall serve as the member of the Sub-Committee;

(ii) Where both nationals have been nominated by the State Party of which they are nationals, a separate vote by secret ballot shall be held to determine which national shall be the member;

(iii) Where neither national has been nominated by the State Party of which he or she is a national, a separate vote by secret ballot shall be held to determine which national shall be the member.

Article 7

If a member of the Sub-Committee dies or resigns or for any other cause can no longer perform the member's Sub-Committee duties, the State Party which nominated the member shall nominate another eligible person possessing the qualifications and meeting the requirements set out in article 4, taking into account the need for a proper balance among the various fields of competence, to serve until the next meeting of the States Parties, subject to approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

Article 9 [6]

The members of the Sub-Committee shall be elected for a term of four years. They shall be eligible for re-election once if renominated. The term of half of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these members shall be chosen by lot by the Chairman of the meeting referred to in article 6, paragraph 1.

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* It was proposed that paragraph 6 be embodied in the rules of procedure of meetings of the States Parties, should they be elaborated. Another proposal was that paragraph 6 be annexed to the present Protocol.

Article 10 [7]

1. The Sub-Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Sub-Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

(a) Half plus one members shall constitute a quorum;

(b) Decisions of the Sub-Committee shall be made by a majority vote of the members present;

(c) The Sub-Committee shall meet in camera.

3. The Secretary-General of the United Nations shall convene the initial meeting of the Sub-Committee. After its initial meeting, the Sub-Committee shall meet at such times as shall be provided in its rules of procedure.

Article 11 [9]

1. The Sub-Committee may decide to postpone a mission to a State Party if the State Party concerned has agreed to a scheduled visit to its territory by the Committee against Torture, pursuant to article 20, paragraph 3 of the Convention. The dates of the rescheduled mission shall be determined taking into account the provisions of articles 1 and 8.

2. The Sub-Committee, while respecting the principles set out in article 3, is encouraged to cooperate for the prevention of torture in general with the relevant United Nations organs and mechanisms as well as international, regional and national institutions or organizations working towards strengthening the protection of persons from torture and other cruel, inhuman or degrading treatment or punishment.

3. If, on the basis of a regional convention, a system of visits to places of detention similar to the one under the present Protocol is in force for a State Party, the Sub-Committee shall still be responsible for missions to such a State Party under this Protocol, assuring its universal application. However, the Sub-Committee and the bodies established under such regional conventions are encouraged to consult and cooperate with a view to the efficient promotion of the objectives of this Protocol, including on the matter of duplication of work.

Such cooperation may not exempt the States Parties belonging also to such conventions from cooperating fully with the Sub-Committee.

4. The provisions of the present Protocol do not affect the obligations of States Parties to the four Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1997, or the possibility for any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.

Article 13 [consolidated 10 and 11]

1. Missions should be carried out by at least two members of the Sub-Committee, assisted by interpreters if necessary. If needed, the Sub-Committee may be assisted by experts.

2. The Sub-Committee shall upon deciding the composition of the mission take into account the particular objectives of the mission.

3. (a) The Sub-Committee shall consult confidentially the State Party concerned, in particular regarding the composition and size of the mission other than with regard to the participating members of the Sub-Committee.

(b) The State Party concerned may oppose the inclusion of an expert or interpreter in the mission to the territory under its jurisdiction, whereupon the Sub-Committee shall propose alternatives.

4. No member of the delegation, with the exception of interpreters, may be a national of the State to be visited. The conduct of the delegation and of all of its members shall be bound by the criteria of independence, impartiality, objectivity and confidentiality.

5. Experts shall be subordinate to and assist the Sub-Committee. With regard to a mission, they shall in all respects act on the instruction of and under the authority of the Sub-Committee. They shall in no case undertake any missions by themselves under the present Protocol.

Article 14

1. In order to establish a list of experts available for the Sub-Committee, each State Party may propose no more than five national experts, qualified in the areas covered by the present Protocol, giving due consideration to gender balance.

2. As needed, the United Nations and specialized agencies may also propose experts to be included on that list.

3. The Sub-Committee will annually notify the States Parties of the comprehensive list of experts.

4. In special cases, where specific knowledge or experience is required for a particular mission, and such knowledge or experience is not available on the list of experts, the Sub-Committee may include in a mission an expert who is not on the list.

5. In selecting experts for a mission, the Sub-Committee shall give primary consideration to the professional knowledge and skills required, taking into account regional and gender balance.

Article 15 [12 bis]

Each State Party shall disseminate information about the present Protocol, the tasks of the Sub-Committee and the facilities to be provided to

the Sub-Committee during a mission to all concerned authorities and ensure the inclusion of such information in the training of relevant personnel, civil, police and military, who are involved in the custody, interrogation or treatment of persons in situations referred to in article 1.

Article 16 [16]

1. The expenditure incurred by the implementation of the present Protocol, including missions, shall be borne by the United Nations.

2. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Sub-Committee under the present Protocol.

Article 17 [16 bis]

1. A Special Fund shall be set up in accordance with General Assembly procedures, to be administered in accordance with the financial regulations and rules of the United Nations, to help finance the implementation of the recommendations made by the Sub-Committee to a State Party expressing the need for additional assistance for its ongoing efforts to improve the protection of persons deprived of their liberty.

2. This Fund may be financed through voluntary contributions made by Governments, intergovernmental and non-governmental organizations as well as other private or public entities.

Article 18 [17]

1. The present Protocol is open for signature by any State which has signed the Convention.

2. The present Protocol is subject to ratification by any State which has ratified or acceded to the Convention. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Protocol shall be open to accession by any State which has ratified or acceded to the Convention.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 19 [18]

1. The present Protocol shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying the present Protocol or acceding to it after the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or instrument of accession, the present Protocol shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 20 [18 bis]

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

Article 21 [19]

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties to the present Protocol and the Convention. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under the present Protocol in regard to any act or situation which occurs prior to the date at which the denunciation becomes effective, or to the actions that the Sub-Committee has decided or may decide to adopt with respect to the State Party concerned, nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Sub-Committee prior to the date at which the denunciation becomes effective.

3. Following the date at which the denunciation of the State Party becomes effective, the Sub-Committee shall not commence consideration of any new matter regarding that State.

Article 22 [19 bis]

1. Any State Party to the present protocol may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to the present Protocol with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting at the conference shall be submitted by the Secretary-General of the United Nations to all States Parties for acceptance.

2. An amendment adopted in accordance with paragraph 1 of the present article shall come into force when it has been accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional process.

3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendment which they have accepted.

Article 23 [20]

Members of the Sub-Committee and of missions authorized under the present Protocol shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions. In particular, they shall be accorded the privileges and immunities specified in section 22 of the Convention on Privileges and Immunities of the United Nations of 13 February 1946, subject to the provisions of section 23 of that Convention.

Article 24

In the conduct of missions, all members shall without prejudice to the provisions and purposes of the present Protocol and such privileges and immunities as they may enjoy:

(a) Respect the laws and regulations of the visited State; and

(b) Refrain from any action or activity incompatible with the impartial and international nature of their duties.

Article 25 [21]

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States.

Notes

a/ The number in brackets refers to the number of the article in the first-reading text (E/CN.4/1996/28, annex I).

b/ There was a divergence of views in the working group as to the relationship between the new body to be established and the Committee against Torture. A number of delegations supported the view that the new body should be a sub-committee of the Committee against Torture, while some delegations proposed that it should be a body separate from the Committee against Torture.

Annex II

TEXT OF THE ARTICLES WHICH CONSTITUTE THE BASIS FOR FUTURE WORK a/

Article 13

"1. In exceptional circumstances, in the context of a mission, the competent authorities of the State Party concerned may make representations to the Sub-Committee or its delegation against a particular visit. Objections may only be made on urgent and compelling grounds of national defence, public or individual safety or serious disorder in the place to be visited which temporarily prevent the carrying out of a visit. The existence of a state of emergency as such should not be invoked by a State Party as a reason to object to a visit.

"2. Following any such representation, the Sub-Committee and the State Party shall immediately enter into consultations regarding those circumstances and seek agreement on arrangements to enable the Sub-Committee to exercise its functions expeditiously. Such arrangements may include the transfer to another place within the jurisdiction of the State Party concerned of any person whom the Sub-Committee proposed to visit. Until the visit takes place, the State Party shall provide information to the Sub-Committee about any person or place concerned."

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a/ See also articles 1 and 8 as contained in document E/CN.4/1997/33, annex II.